United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 31, 2004

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Canterbury Villa of Alliance
Case 8-CA-34792-1

District 1199, Service Employees
International Union, AFL-CIO
(Canterbury Villa Operations Corp.)
Case 8-CB-10044-1

530-6033-0700
530-6033-4280
530-6067-2070-3300
530-6067-2070-6071
554-1433-3350

These cases were submitted for advice as to whether the Union violated Section 8(b)(3) by insisting that contract negotiations be open to any Union member wishing to observe, or whether the Employer violated Section 8(a)(5) by refusing to negotiate in the presence of the Union members.

We agree with the Region that the presence of Union-member observers, who are not part of the Union's bargaining committee or otherwise present to assist the Union in negotiations, is a nonmandatory subject of bargaining. Therefore, the Union violated 8(b)(3) by its continued insistence on this issue. [*FOIA Exemption 5*

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FACTS

Canterbury Villa of Alliance (the Employer) operates a nursing home facility in Alliance, Ohio. District 1199, Service Employees International Union, AFL-CIO (the Union), represents about 65 employees at the nursing home.

The Employer took over operations of the facility on about February 1, 2003.[1] The Employer initially refused to adopt the predecessor employer's labor contract or otherwise recognize and bargain with the Union. After the Union initiated Board proceedings, the Employer recognized the Union on May 12 and the parties began negotiations for a collective-bargaining agreement in October.

On October 17, chief Union negotiator Mary Fleure sent the Employer a letter identifying five employees as the

[1] All dates are in 2003 unless otherwise indicated.

Union bargaining committee. The first negotiating session took place on October 28. Present for the Union were Fleure and the five employees identified in the October 17 letter. Present for the Employer were Administrator Ted Powell and attorney Jeffrey Belkin. The same individuals attended the second bargaining meeting on November 12.

The third bargaining meeting was held on December 4. The Union invited an additional individual to attend this meeting, who Powell recognized as an employee from the Employer's sister facility. Belkin objected to having an "outsider" present at the meeting. Fleure responded that the individual was a Union member and that the negotiations were open to all Union members. The issue was not resolved, and the parties agreed that a federal mediator should be present at the next meeting due to the parties' disagreement on a number of issues.

The fourth meeting was held on December 18 in the presence of federal mediator Tom Connelly. No "outsiders" attended. The next meeting, on December 30, was attended by a bargaining unit employee who was not on the Union's negotiating committee. Belkin stated that the Employer would not bargain in the presence of individuals who were not on the Union bargaining committee. Fleure insisted that negotiations were open to Union-member observers. Belkin and Powell then left the room. After the Union met with federal mediator Connelly behind closed doors, the employee left. Fleure claimed that the employee left to attend training, and not in response to the Employer's objections. Negotiations then began.

The sixth and final face-to-face bargaining session took place on January 22, 2004. The parties bargained all morning. Around noon, a unit employee who was not a member of the bargaining committee walked into the room. Belkin told Fleure that he thought the parties had settled the issue of outsiders attending bargaining sessions. Fleure responded that the meetings were open to Union-member observers. Belkin reiterated that the Employer would not negotiate with outsiders present.

On about January 23, 2004, Union official Becky Williams told Belkin by telephone that the Union insists upon open negotiations. That same day, Belkin offered a compromise to allow each side to have as many as two outsiders in the room on a non-precedential basis. The Union rejected the Employer's suggestion, maintaining that any Union member had the right to attend and observe bargaining sessions.

On January 30, 2004, Belkin sent a letter to Fleure stating that the Employer would not meet with the Union so long as the Union insisted on the unconditional right of Union members to attend and observe contract negotiations. Face-to-face bargaining has not recurred, although the parties have agreed to meet in separate rooms with the federal mediator shuffling between them.

ACTION

We agree with the Region that the presence of Union-member observers, who were not part of the Union's bargaining committee or otherwise present to assist the Union in negotiations, is a nonmandatory subject of bargaining. Therefore, the Region should issue complaint, absent settlement, alleging that the Union violated Section 8(b)(3) by its continued insistence on an open-door policy permitting every member to observe negotiations. [*FOIA Exemption 5*

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The Board has developed two distinct analytical frameworks to resolve questions over who may attend collective-bargaining sessions. The first derives from the statutory right of each party to designate their own collective-bargaining representative. The second does not concern the designation of a bargaining representative, but instead addresses whether a party's insistence on the presence of someone outside the bargaining committee is a mandatory or permissive subject of bargaining. The Board has not specifically addressed whether a union may lawfully insist that its entire membership be allowed to attend, and merely observe, collective-bargaining negotiations. However, we conclude that the Union's insistence on member-observers did not implicate its statutory right to designate its bargaining committee, but was an unlawful insistence on a permissive subject of bargaining.

The right of employees to designate and to be represented by representatives of their own choosing is a basic policy and fundamental right guaranteed employees by Section 7 of the Act.[2] Thus, each party to the collective

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[2] Native Textiles, 246 NLRB 228, 229 (1979). See also Dilene Answering Service, 257 NLRB 284, 291 (1981), citing General Electric Company v. NLRB, 412 F.2d 512 (2d Cir. 1969) (the Act bestows on either party the right to be represented and assisted in the manner which it deems best

bargaining process generally has the right to choose whomever it wants to represent it in formal labor negotiations, and the other party has a correlative duty to negotiate with the appointed agents.[3] For example, it is well established that a union may include "outsiders" on its bargaining team.[4] An employer objecting to a union's choice of bargaining representative bears the heavy burden of showing that the selected representative would present a "clear and present danger" to the collective-bargaining process[5] or create such ill will that bargaining would be impossible or futile.[6]

This case is unlike situations where an employer refuses to deal with designated members of a union's negotiating team. For example, in Dilene Answering Service,[7] the employer refused to negotiate with the union

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and a concomitant obligation to deal with each other's chosen representatives absent extraordinary circumstances).

[3] Ball Corp., 322 NLRB 948, 951 (1997), quoting Harley Davidson Motor Co., 214 NLRB 433, 437 (1974).

[4] See General Electric Co. v. NLRB, 412 F.2d at 516 (members of other international unions); NLRB v. Indiana & Michigan Electric Co., 599 F.2d 185, 191 (7th Cir. 1979), cert. denied 444 U.S. 1014 (1980) (members of other bargaining units represented by same union).

[5] Compare CBS Inc., 226 NLRB 537, 539 (1976), enfd. 557 F.2d 995 (2d. Cir. 1977) (employer not obligated to bargain with union negotiating committee containing individual who represented employees solely of employer's competitors, particularly when the negotiations were focused on confidential new technology) with Milwhite Company, 290 NLRB 1150, 1151 (1988) (employer obligated to bargain with union even though member of union negotiating team, the union president, was long-time employee of competitor).

[6] Compare Fitzsimons Manufacturing Co., 251 NLRB 375, 379-80 (1980), affd. per curiam 670 F.2d 663 (6th Cir. 1982) (employer not obligated to meet with union representative who, without provocation, had physically assaulted and threatened employer's personnel director during grievance meeting) with Long Island Jewish Medical Center, 296 NLRB 51, 71-72 (1989) (employer obligated to meet with union representative who had lightly pushed manager, used obscenities toward manager, and blocked manager's egress from desk).

[7] 257 NLRB 284 (1981).

so long as four employees were present, claiming they were only observers and not true union representatives. In finding that the employer violated 8(a)(5), the fact that the union told the employer that the employees were part of the union committee and would participate in negotiations "should have foreclosed any further inquiry by [the employer]."[8] In contrast, here the Union informed the Employer at the outset of negotiations that its negotiating committee would consist of Fleure and five specific unit employees. When additional Union members arrived unannounced at three different bargaining sessions, the Union told the Employer that all Union members were entitled to observe negotiations. The Union never attempted to alter the composition of its pre-identified bargaining team.[9] Nor did it explain to the Employer how the additional Union members attending negotiating sessions would be assisting in bargaining rather than as mere observers.[10] Thus, the broad Section 7 right of employees to designate and to be

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[8] Id. at 291. See also Caribe Staple Co., 313 NLRB 877, 889 (1994) (employer's demand that union bargaining committee be reduced from 10 to 4 persons because certain employees on the committee "participate to no extent in the negotiations," unlawful where employer was clearly attempting to alter the size of the union's bargaining committee).

[9] Compare Standard Oil Co. v. NLRB, 322 F.2d 40, 44 (6th Cir. 1963) (unions designated individuals from other locals' bargaining committees as "temporary representatives" on their bargaining committees); Allbritton Communications, 271 NLRB 201, 206, 244 (1984), enfd. 766 F.2d 812 (3d. Cir. 1985), cert. denied 474 U.S. 1081 (1986) (union designated official of other union to be part of bargaining committee for two dates).

[10] Although the Union claims in its most recent written position statement that Fleure told the Employer that the additional Union members were present to assist the Union in negotiations, we agree with the Region's decision not to credit the Union attorney's belated, post-hoc version of the facts. The Union's initial position statement did not claim that the Union ever informed the Employer that the additional Union members would be present to assist in negotiations. This is consistent with both the Employer's position and Union officials' repeated, unequivocal assertions to the Region that any Union member can walk into any bargaining session at any time to observe negotiations. Therefore, we reject any contention that the Union told the Employer it intended to rely on the member-observers to assist with the negotiations.

represented by representatives of their own choosing at formal labor negotiations is not at issue here.[11]

Since the Union's right to designate its bargaining committee is not at issue here, we conclude that the Union's insistence on an open-door policy permitting its entire membership to observe negotiations, is a nonmandatory subject of bargaining. This case is more analogous to those where the Board has found the presence of court reporters or stenographers during negotiations to be a nonmandatory subject of bargaining.[12] The use of a court reporter tends to inhibit the free and open discussion necessary for conducting successful collective bargaining. The Board has found that the presence of a court reporter or stenographer tends to formalize proceedings and reduces the spontaneity and flexibility often manifested in successful bargaining; encourages both sides to talk for the record rather than for purposes of advancing toward eventual settlement; effectively reduces the options of the parties to the exchange of written communiqués; and tends to create tension and suspicion.[13] Furthermore, such issues are "preliminary and subordinate to substantial negotiations," and permitting a party to "stifle negotiations in their inception over such a threshold issue" would not foster meaningful collective bargaining.[14]

The Union's position that its membership has an absolute right to attend and observe formal contract negotiations implicates similar concerns as when a party insists on the presence of a court reporter or stenographer. The Union's policy would impose upon negotiations an audience of Union members unlimited in number and unidentified to the Employer.[15] Similar to

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[11] Accordingly, the Union's reliance on language in Saint-Gobain Abrasives, Inc., Case 1-CA-40817, Advice Memorandum dated July 30, 2003, is misplaced.

[12] Bartlett-Collins Co., 237 NLRB 770, 772-73 (1978), enfd. 639 F.2d 652 (10th Cir.), cert. denied 452 U.S. 961 (1981). See, also The Timken Co., 301 NLRB 610, 614-15 (1991); Latrobe Steel Co., 244 NLRB 528, 531-32 (1979), enfd. in pertinent part 630 F.2d 171 (3d. Cir. 1980), cert. denied 454 U.S. 821 (1981).

[13] Latrobe Steel Co., 244 NLRB at 528 fn. 1, 532; Bartlett-Collins Co., 237 NLRB at 773 fn. 9.

[14] Bartlett-Collins Co., 237 NLRB at 772-73.

[15] Although none of the three incidents involved multiple Union-member observers, the Union has consistently taken the

having a written transcript, the presence of member-observers would tend to impede negotiations by chilling the candor and free exchange of ideas so important to successful, good-faith collective bargaining. The Employer, not knowing the identity of who is in the negotiating room on any given occasion, would be reasonably apprehensive about speaking candidly.[16] An audience of Union members would also tend to impede the Union negotiators' ability to reach agreement by inhibiting them from making the sometimes painful compromises inherent in good-faith collective bargaining. In these circumstances, the Union is not privileged to impede substantive negotiations over a preliminary matter such as who may attend and observe bargaining sessions,[17] particularly when the Employer made a reasonable attempt to bargain an accommodation over the issue, while the Union would not budge.[18]

Accordingly, the Region should issue a Section 8(b)(3) complaint, absent settlement, [*FOIA Exemption 5*

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B.J.K.

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position that it considers bargaining sessions unconditionally open to all Union members.

[16] Cf. L.G. Everist, Inc., 103 NLRB 308, 309 (1953) (employer's insistence that rank-and-file employees attend negotiations "was not conducive to the orderly, informal and frank discussion of the issues confronting the negotiators necessary to reach a contract"); United Restoration, d/b/a United Air Comfort, Case 36-CA-9318, Advice Memorandum dated October 30, 2003, at p. 4 (unlawful to insist on using videoconference system – rather than meeting face-to-face – to negotiate initial collective-bargaining agreement; emphasizing need to speak candidly during negotiations, with knowledge of who is attending).

[17] Bartlett-Collins Co., 237 NLRB at 773.

[18] Id. at 773 fn. 10.